

- (1) Whether claimant's Application for Director's Review which was later amended to request review by the Appeals Board conferred jurisdiction upon the Appeals Board to review the Award entered in this proceeding.
- (2) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on January 16, 1993.

- (3) The nature and extent of claimant's injury and disability, if any.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds:

The Award entered by the Administrative Law Judge should be affirmed.

- (1) The Administrative Law Judge's Award is dated September 27, 1994. Therefore, the effective date of the Award is September 28, 1994. See K.A.R. 51-18-2. On October 5, 1994, claimant filed a document entitled "Application for Director's Review" with the Division of Workers Compensation and on October 31, 1994 filed a document entitled "Amended Application for Review by the Worker's Compensation Appeals Board."

The Appeals Board finds the document filed on October 5, 1994, conferred jurisdiction on the Appeals Board despite its language requesting a review by the Director. The document plainly and unquestionably served notice on both the respondent and the Division of Workers Compensation that claimant requested review of the Award entered by the Administrative Law Judge. Because it was filed with the Division within ten days of the effective date of the Award, the document was timely filed.

- (2) Claimant contends he re-injured or aggravated his left arm and shoulder on January 16, 1993 when he fell from another individual's pickup truck while attempting to free his own pickup from a snowdrift in the respondent's driveway. Claimant contends the accident arose out of and in the course of his employment with the respondent because the incident occurred after the claimant clocked into work and while claimant was attempting to open the respondent's driveway to permit travel to and from respondent's motel.

Because of claimant's history of preexisting injury and symptoms, the Administrative Law Judge concluded that claimant failed to establish that it was more probably true than not that claimant either re-injured or aggravated his left arm and shoulder in the January 16, 1993 accident. The Appeals Board agrees. Claimant contends he initially injured his left upper extremity in November 1992 when he fell from a chair while working for the respondent. He also contends the injuries he sustained in the chair incident were improving until he fell from the truck on January 16, 1993 and that his arm and shoulder have worsened and progressively deteriorated since the January 1993 incident. Claimant acknowledges he has never claimed workers compensation benefits for the injuries sustained in the November 1992 chair incident. Therefore, the claim in this proceeding is limited to the January 16, 1993 accident.

Because claimant was already under treatment for his left arm and shoulder at the time of the January 1993 incident, the principal issue now before us is whether claimant sustained additional injury or aggravation when he fell from the truck for which he would be entitled to receive workers compensation benefits. Claimant testified that before he fell from the truck in January 1993 he was treating with Dr. Shapiro and had earlier that same day undergone an MRI. In the two months before the January 1993 fall claimant had also seen Dr. Ward at the Pratt Regional Medical Center Emergency Room, Dr. Suiter, Dr. Eastes, and a chiropractor for left upper extremity symptoms.

Claimant presented the testimony of board-eligible neurologist William M. Mallonee, M.D., who saw claimant in September 1993. Claimant told Dr. Mallonee he hurt his arm and neck when he fell from a chair in November 1992 while working for the respondent. After examining claimant and reviewing his medical records, the doctor diagnosed brachial plexus injury. Dr. Mallonee believes the brachial plexus injury constitutes a "100% disability of the left arm, and thus 60% disability to the body as a whole," according to his interpretation of the AMA Guides. However, the doctor indicated that his rating was

subjective and could have been more precise if he had examined claimant for the purpose of determining his functional impairment rather than seeing claimant for consultation purposes on a referral from another physician. Dr. Mallonee testified that claimant's symptoms in December 1992 were consistent with a brachial plexus injury which would indicate that claimant's brachial plexus injury preexisted the January 1993 fall. Neither party asked for this doctor's opinion whether the January 1993 fall either aggravated or further injured the left upper extremity.

The respondent presented the testimony of Daniel J. Suiter, M.D., who is board certified in gastroenterology and internal medicine, and L. Theil Bloom, M.D., who is board certified in radiology. Dr. Suiter testified that he saw claimant in November and December 1992 and that claimant complained of pain in the left arm and very little grip strength in the left hand. Dr. Suiter believes claimant had sustained a severe injury by December 1992 of such extent that it could have progressed and worsened without any new injury. No opinion was given whether the January 1993 fall re-injured or aggravated the left upper extremity.

Dr. Bloom testified that he saw claimant at another physician's request in November 1992 and performed an x-ray examination. At that time claimant complained of pain and numbness in the left arm from his neck to his elbow. Dr. Bloom testified that claimant's x-rays indicated that several pathological conditions, including degenerative arthritis in the lower cervical spine with bony entrapment, stenosis of the neurocanal, disc disease, and nerve root compromise, should have been considered as causing claimant's symptoms. The doctor also interpreted the MRI taken on January 16, 1993 which indicated that claimant had extensive degenerative joint disease throughout the cervical spine with numerous bulging and extruding disc fragments. The MRI confirmed nerve entrapment in Dr. Bloom's mind and also demonstrated that claimant had disc disease compromising the spinal canal and the foraminal canals which could have accounted for claimant's then-clinical presentation of pain in the left shoulder and down into the fingers.

Based upon the entire record, the Appeals Board finds that claimant had a severe injury to his left upper extremity before the alleged accident on January 16, 1993 for which he was undergoing active medical treatment. The Appeals Board further finds that claimant has failed to prove the January 1993 incident caused additional injury or aggravation. Therefore, the Appeals Board adopts the conclusion of the Administrative Law Judge that claimant should be denied workers compensation benefits in this proceeding. This finding renders moot the issue whether claimant's accident arose out of and in the course of his employment with the respondent.

The Appeals Board hereby adopts the Administrative Law Judge's findings as set forth in the Award to the extent they are not inconsistent with those specifically made herein.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge George R. Robertson dated September 27, 1994, should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Eldon L. Meigs, Pratt, KS  
Allen G. Glendenning, Great Bend, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director